No. 11,894

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRINTING SPECIALTIES AND PAPER CONVERTERS UNION, LOCAL 388, A.F.L., and WALTER J. TURNER,

Appellants,

vs.

HOWARD F. LEBARON, Regional Director of the 21st Region of the National Labor Relations Board, on behalf of the National Labor Relations Board,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

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MEMORANDUM OPINION BELOW.

The "Memorandum of Ruling and Order Granting Injunction under Section 10(l) of the National Labor Relations Act, as Amended" of the District Court of the United States for the Southern District of California, Central Division (R. 101-112)* is reported under the name of *LeBaron, etc. v. Printing Specialties and Paper Converters Union, etc., et al.*, 75 F. Supp. 678.

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*All references are to the printed transcript of record.

JURISDICTION AND STATUTE INVOLVED.

The jurisdiction of this Court is invoked under Section 129 of the Judicial Code, as amended, 28 U.S.C.A. §227, page 379.

Pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, Public Law 101, 80th Cong., Ch. 120, 1st Sess. (popularly referred to as the "Taft-Hartley Act") are as follows:

Section 8(b)(4)(A).

"It shall be an unfair labor practice for a labor organization or its agents—

"to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *"

Section 8(c).

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 10(l).

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States * * * within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * * Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge of such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee

members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit * * *"

Section 16.

"If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

STATEMENT OF THE CASE.

This appeal arises out of the prohibition of peaceful picketing of the products of a struck concern in the course of a bona fide labor dispute and lawful strike over wages and holiday pay by means of an injunctive order of the District Court under color of authority of Section 10(l) of the amended National Labor Relations Act.

Printing Specialties and Paper Converters Union, Local 388, appellant herein, is a subordinate union of the International Printing Pressmen and Assistants' Union of North America, affiliated with the American Federation of Labor. Local 388 includes within its membership approximately 1,800 employees of the paper conversion and allied industries in the City of Los Angeles and nearby communities. The Union membership is covered by numerous collective bargaining agreements with employers engaged in the

manufacture, distribution and sale of a variety of paper products. (R. 20.)

By the terms of said agreements, contracted during the twelve months period immediately prior to the commencement of this action, 1,500 members of the union were assured of a prevailing scale of minimum wages ranging from $1.20 to $1.33½ per hour for the lowest-skilled male job classifications and from $1.10 to $1.22½ per hour for the lowest-skilled female job classifications, with progressively higher rates for skilled job classifications. (R. 20-21.) These 1,500 union members also received six paid holidays annually under said agreements. (R. 21.)

Sealright Pacific, Ltd., the charging party, is a corporation engaged in the manufacture, sale and distribution of paper food containers and milk bottle caps in Los Angeles. (R. 29, 101, 135.) It recognized Local 388 as the exclusive bargaining agent of its production employees at the Los Angeles plant in September, 1941. Each year thereafter, from 1941 to 1946, collective bargaining agreements were negotiated and executed between Sealright and Local 388 through negotiations, and without any strike or other interruption of work. (R. 21.)

On August 16, 1947, Local 388 gave notice to Sealright of proposed modifications in the latest union agreement which had an anniversary date of October 16, 1947. Said 60-days' notice of reopening was given in accordance with the terms of the contract, and in accordance with the procedure contemplated by Sec-

tion 8(d)(1) of the amended National Labor Relations Act. (R. 21-22.)

Between August 16, 1947 and October 29, 1947, approximately eleven meetings were held between representatives of Local 388 and officers of Sealright for the purpose of negotiating a new labor contract, during the course of which meetings mutual consent was arrived at between the two parties as to all terms of a new collective bargaining agreement except wage rates and holiday pay. (R. 22-23, 105.)

On September 15, 1947, in compliance with Section 8(d)(3) of the amended National Labor Relations Act, Local 388 notified the Federal Mediation and Conciliation Service and the California State Department of Industrial Relations that a dispute existed. (R. 22.) After the required 30-day waiting period had expired, Sealright having rejected a compromise proposal offered by the union, and having refused to meet the established industry standards for wages and holidays, Local 388 called a lawful strike of its members against Sealright. (R. 22-23.)

The final offer of Sealright prior to the instituting of the strike would have provided the employees with three (3) paid holidays as against the prevailing standard of six (6) holidays, and fell between 17c to 23½c per hour below the prevailing male base rate, and between 22½c to 29½c per hour below the prevailing female base rate. (R. 22-23.)

At the time the strike was instituted, all of the approximately seventy (70) production employees of the

Los Angeles plant of Sealright were members in good standing of Local 388, and all but three (3) of said employees joined in said strike against their employer. (R. 23, 106.)

Peaceful picket lines were established by striking members of Local 388 in front of or near the entrances to the struck plant upon the occasion of the commencement of the strike. (R. 23-24.) (Appellee has made no contention that said strike and picket lines in the vicinity of the struck plant were in any respect unlawful.)

On or about November 14, 1947, members of Local 388 on strike at Sealright Pacific, Ltd. formed a picket line around two trucks loaded with Sealright's products at the local terminal of the Los Angeles-Seattle Motor Express, Inc. The strikers informed the trucking concern's employees that the Sealright products were manufactured under strike conditions and for substandard wages, and requested them not to handle the products. After November 14, 1947, the employees of the trucking concern refused to transport or handle Sealright goods. (R. 24-25; cf. R. 136-137.) The only evidence relating to the character of these picketing activities shows that they were peaceful, and "at no time did any officer, agent, representative, or member of Local 388 order, force, threaten any reprisal against or promise any specific benefit to any employee of the Los Angeles-Seattle Motor Express, Inc." (R. 24-25; cf. R. 104, 136.)

At about the same time, according to the record herein, Appellant Walter J. Turner, Secretary-

Treasurer of Local 388, advised one Mr. Lacey, manager of the Los Angeles-Seattle Motor Express, Inc. that the union was engaged in a strike due to a wage dispute with Sealright, and that members of Local 388 intended to picket Sealright's products manufactured under strike conditions and at substandard wages for the purpose of publicizing the dispute and soliciting the assistance of other workers asking that they decline to handle this merchandise. (R. 24; cf. R. 103, 136.)

The uncontradicted affidavit filed herein by Appellant Turner specifically denies that he ever advised Los Angeles-Seattle Motor Express, Inc. that Local 388 would picket all or any of that firm's operations as such, if it continued to handle Sealright's products, and furthermore denies that he ever in any way indicated or implied that Local 388 would picket any other products being handled or transported by that firm for companies other than Sealright under any circumstances whatsoever. (R. 24.)

On November 17, 1947, and for several days thereafter, striking members of Local 388 picketed Sealright products being loaded onto three freight cars by employees of the West Coast Terminals Co., which products were rolls of paper consigned from the New York plant to the Los Angeles plant of Sealright Pacific, Ltd. for use in manufacturing operations under strike conditions. The three freight cars in question were located on a siding alongside a West Coast warehouse at Terminal Island, Long Beach, California, and the picket lines did not pass in front

of the door of the warehouse or otherwise interfere with the normal operations of the West Coast Terminals Co. not involving Sealright products. Whenever during such picketing, it was necessary for the West Coast Terminals Company to move these three box cars in order to move other cars on to or remove other cars from the siding, the striking members of Local 388 temporarily discontinued their picketing activities and did not in any way interfere with the moving of the three box cars in question incidental to these operations. Subsequent to November 17, 1947, the employees of West Coast refused to handle or work on goods consigned to Sealright.

Here again, the only evidence relating to the character of these picketing activities shows that they were peaceful, and "At no time in connection with the peaceful picketing of said Sealright products alongside the warehouse of the West Coast Terminals Company did any officer, agent, representative or member of Local 388 order, force, threaten any reprisal against or promise any specific benefit to any employee of said firm." (R. 25-26; cf. R. 104-105, 137.)

On or about November 18, 1947, Sealright Pacific, Ltd. filed a charge with the National Labor Relations Board alleging that Local 388 had engaged in and was engaging in unfair labor practices contrary to Section 8(b)(4)(A) of the amended National Labor Relations Act by means of threats of picketing allegedly communicated to Los Angeles-Seattle Motor Express, Inc., and picketing at the West Coast Terminals Com-

pany docks in Terminal Island. (R. 27-30, 101-102, 135.)

After investigating the charge, Appellee LeBaron, who is the Regional Director of the 21st Region of the National Labor Relations Board, filed a document with the District Court entitled "Petition for an Injunction under Section 10(l) of the National Labor Relations Act, as Amended." (R. 2-8; 102; 134.) This document, which the District Court refers to as a "verified petition" (R. 102, 134), is completely devoid of any allegations of fact relating to the activities herein complained of. The sole allegation relating to the acts of the respondents and appellants is a legal conclusion that "* * * Petitioner has reason to believe and believes that respondents and each of them have engaged in and are engaging in conduct in volation of Section 8(b), subsection 4(A) of the Act, within the meaning of Section 2(6) and (7) of the Act as follows", coupled with six subparagraphs lettered "a" to "f" enumerating the factual matter which the appellee alleges he "has reason to believe and believes." (R. 4-6.) Attached to the petition as "Exhibit 1," is a copy of the charge referred to above, which merely alleges threats of picketing and picketing by Local 388. (R. 27-30.)

Appellee filed no affidavits and presented no witnesses in support of his petition. (R. 152-153.)

Upon return of the order to show cause issued upon motion of the appellee (R. 8-10), appellants interposed a motion to dismiss the petition for injunctive

relief under Section 10(l) of the amended National Labor Relations Act for lack of jurisdiction, on the ground that the invoked sections, 8(b)(4)(A) and 10(l) as well as the relief sought are violative of Amendments I, V, and XIII of the Constitution of the United States. (R. 10-19.) The motion was supported by an affidavit of Appellant Turner, which represents the only direct evidence relating to the factual situation involved herein in the entire record. (R. 20-26.)

Following the submission of memoranda of points and authorities by both parties (R. 12-19, 31-50, 51-79, 82-96, 97-101) and the receipt of oral argument (R. 154-217), the District Court issued its "Memorandum of Ruling and Order Granting Injunction under Section 10(l) of the National Labor Relations Act as Amended" on February 3, 1948 (R. 101-112; reported at 75 F. Supp. 678), and, over the written (R. 120-127) and oral (R. 217-241) objections of counsel for appellants, on February 16, 1948 made its findings of fact and conclusions of law and order for injunctive relief, together with the dismissal of appellants' motion to dismiss. (R. 134-140.)

The order appealed from enjoins and restrains appellants "pending the final adjudication by the Board of this matter" from:

> "Engaging in, or inducing or encouraging the employees of any employer, *by picketing,* orders, force, threats or promises of benefit, *or by any other like or related acts or conduct* to engage in, a strike or a concerted refusal in the course of

their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services where an object thereof is forcing or requiring any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of, or to cease doing business with Sealright Pacific, Ltd." (R. 142.)*

GENERAL COMMENT ON THE ISSUES.

Whatever may be the propriety of commenting in such fashion upon pending litigation before the National Labor Relations Board and the Courts, both the Joint Congressional Committee on Labor-Management Relations and the General Counsel of the Board have stated rather fully and publicly their views concerning the issues raised by this case.

The *Joint Committee on Labor-Management Relations,* established pursuant to Section 401 of the so-called "Taft-Hartley Act" (Public Law 101, 80th Cong. Ch. 120, 1st Sess.) filed its first report with the Senate and House of Representatives on March 15, 1948. (Senate Report No. 986, 80th Cong., 2d Sess.). This report says in part:

"A total of 132 charges alleging secondary boycotts under the act were filed between August 22, 1947, and February 1, 1948. During such period

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*Unless otherwise indicated, all emphasis in quotations indicated by italics has been supplied.

the Board filed petitions for injunctions pursuant to Section 10(l) in 9 of the 132 cases * * *

"In the most recent case the Board's petition was granted by the United States District Court for the Southern District of California. Local 388 of the Printing Specialties and Paper Converters Union, A. F. of L., had called a strike of the employees of Sealright Pacific, Ltd., over wage rates and holiday pay * * *

"The Board charged that the action of Local 388 in inducing the employees of the [Los Angeles-Seattle] Motor Express and West Coast Terminals Cos. not to handle Sealright's goods constituted a secondary boycott prohibited by the act. The court found the union's defense, that the act's provisions violated amendments 1, 5, and 13 of the Constitution, was without merit, and on February 3, 1948 granted the requested injunction pending consideration of the case on its merits by the Board. (*LeBaron v. Printing Specialties and Paper Converters Union, Local 388, AFL, et al.*, 21 L.R.R.M. 2268, ... F. Supp. .....) * * *

"It is anticipated that tests will be made in the Supreme Court on the constitutionality of the new act's restrictions on secondary boycotts * * * Unions may be expected to seek such a test in *a case where the only act complained of is peaceful picketing* in support of a secondary boycott, contending that such conduct is *an exercise of their constitutional right of free speech.* Such argument has been made and rejected by a lower court in granting a temporary restraining order. *This committee will continue its study of these cases in the interest of being prepared to offer*

remedial legislation should defects in the present provisions become apparent."

(Senate Report No. 986, 80th Cong. 2d Sess., pp. 16-19.)

Similarly, *the General Counsel of the National Labor Relations Board* has disseminated his views concerning the instant case in the form of remarks made to a Conference of Circuit and District Judges of the Fifth Judicial Circuit at New Orleans, Louisiana on June 4, 1948. (Board Press Release R-87.)

In this speech, the general counsel declared:

"The mandatory injunctive proceedings brought under Section 10(l) involved alleged violations of Section 8(b)(4)(A), the secondary boycott provision, in almost all of which *the protection of Section 8(c), the 'Free Speech' provision has been claimed.* In none of these cases has the Board handed down its decision, but in several, the Trial Examiners have issued their intermediate reports. A comparison of the treatment by the courts and the Examiners is worthwhile:

* * * * * * *

"The main attacks on this provision have been that it violates the First, Fifth, and Thirteenth Amendments. In every instance these attacks have been overruled by the District Courts. (*LeBaron v. Printing Specialties Union,* 75 F. Supp. 678 (S. D. Calif.); * * *) There can be no serious quarrel with these rulings * * *

"The issue, if there is one, seems to lie in the interpretation of the words, 'induce or encourage'. Do they forbid inducement or encourage-

ment by mere persuasion? Does peaceful picketing fall within the prohibition? In the *Thornhill* and *Carlson* cases (*Thornhill v. Alabama,* 319 U. S. 88 (1940); *Carlson v. California,* 310 U. S. 106 (1940).), the Supreme Court has classified peaceful picketing as protected free speech. Whether it will do so under this statute remains to be seen, but meanwhile there is no question that picketing, though peaceful, loses its constitutional protection when indulged in pursuit of an illegal objective, or in an industry unrelated to the controversy. The *Ritter's Cafe* case, (*Brotherhood of Carpenters v. Ritter's Cafe,* 315 U. S. 722 (1942).) * * * seems to have settled that. And in view of the *Duplex Deering* and *Bedford Stone Cutters* cases decided about 25 years ago, there should be no doubt that peaceful picketing in pursuit of a secondary strike or boycott does not enjoy constitutional protection.

"Doubt has arisen, however, because of several cases decided by the Supreme Court between 1941 and 1943, which reversed as *contrary to the First Amendment, State Court decrees enjoining peaceful picketing by strangers to the picketed establishment,* because in the State Court's opinion there could be no labor dispute between an employer and strangers to his employ. (*A. F. L. v. Swing,* 312 U. S. 321 (1941); *Bakery Drivers Union v. Wohl,* 315 U. S. 769 (1942); *Cafeteria Employees v. Angelos,* 320 U. S. 293 (1943).)

"These cases have been heavily relied upon by the unions in several of the injunction cases, as establishing the right of labor organizations under the Free Speech amendment, to peacefully picket

employers with whom they have no direct dispute, but who deal in the products of an employer with whom they have such dispute, and, thereby as supporting their *contention that Section 8(b)(4)(A) is unconstitutional insofar as it is construed to forbid such picketing* * * *

"*The question has been squarely raised in three cases,* two against the Carpenters Union * * * and the third against the AFL Printing Specialties Union, involving a paper container company in Los Angeles. (*LeBaron v. Printing Specialties Union (Sealright Pacific, Ltd.),* 75 F. Supp. 678 (S. D. Calif.)) * * *

"The General Counsel's office agrees with the District Courts which * * * not only overruled *the contention that such picketing was protected by the First Amendment,* but also overruled *the contention that it was protected by Section 8(c) of the Act.*

"The Trial Examiners' treatment of the questions has been generally more detailed in the three cases I have just noted. In accordance with Board doctrine, they assume the constitutionality of the challenged provisions of the statute, and merely considered the contention that the conduct was immune under the statute itself * * *

"In * * * two cases, the Trial Examiners both assumed a general premise: First, that *the immunity granted under Section 8(c) to non-threatening expressions of views applies to the exercise of speech by labor organizations,* as well as by employers—a proposition supported by the language of the provision and its legislative history; and, second, that *peaceful picketing is an expression of views, argument, or opinion within the*

meaning of Section 8(c), and unless it contains threats or is attended by circumstances making it the equivalent of a threat, it enjoys the immunity of Section 8(c).

"* * * the Trial Examiner in the *Los Angeles* case (*Matter of Printing Specialties Union (A.F.L.) and Sealright Pacific, Ltd.,* Case No. 21-CC-13 (May 4, 1948) concluded that peaceful picketing had no such threatening significance in respect to employees who were not members of the respondent union, or of a union associated in picketing with the respondent union, and, in such a case, was protected by Section 8(c) * * *

"Where the Trial Examiners part company with the General Counsel is upon the question of whether, in the light of present day realities, a picket sign of a union, whether one to which an employee belongs or not, is not such as to put the employee in fear of his standing with his own union, or his fellow members, or his fellow workers, as the case may be, so as, in effect, to coerce his will. Or a promise of benefit that 'If you don't cross my picket line, I'll not cross yours.' * * *

"That question, as well as other choice issues which time does not permit me now to go into, is still to be passed upon by the Board, and ultimately, the reviewing courts."

(National Labor Relations Board Press Release R-87, pp. 21-26.)

As will be amplified by the argument set out below, appellants contend that if the interpretation of the legislation contended for by the general counsel is

to be deemed correct, then Section 8(b)(4)(A) is contrary to the First, Fifth, and Thirteenth Amendments, and the District Court lacked jurisdiction to proceed under Section 10(l). On the other hand, if Section 8(c) protects peaceful picketing of the products of a struck plant under the circumstances of this case then the fact of such picketing cannot "constitute or be evidence of an unfair labor practice" in a proceeding under Section 10(l), and the petition herein should have been dismissed by the District Court for that reason.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that Congress clearly has power under the Constitution to enact the provisions of the amended National Labor Relations Act here in question;

2. In holding that "the provisions of the Labor Management Relations Act, 1947, here under attack are valid congressional legislation and are not unconstitutional";

3. In holding that the provisions of the amended Act here in question do not infringe upon the freedom of speech and assembly guaranteed to all by the due process clause of the Fifth Amendment and by the First Amendment to the Constitution;

4. In holding that Congress has in Section 8(b)(4)(A) of the amended Act "kept within the permis-

sive restrictions on free speech and assembly that have been approved by the Supreme Court in comparable legislation";

5. In holding that an object of the picketing activities here involved was "the type of coercion that is attended with serious repercussions and dire consequences upon the interests of the two strangers to the labor dispute between Sealright and the Union";

6. In holding that such picketing activities are a "form of forcible technique" which is "subject to restrictive regulation by the State in the public interest on any *reasonable basis.*"

7. In holding that the prohibition against involuntary servitude in the Thirteenth Amendment to the Constitution of the United States and the guarantee of liberty set forth in the Fifth Amendment have not been contravened by any of the provisions of the amended Act here in question;

8. In holding that the inherent and statutory rights of employees as such are preserved by "saving provisions" in Section 502 of the Labor Management Relations Act, 1947;

9. In holding that Section 8(b)(4)(A) of the amended National Labor Relations Act is not unconstitutionally vague or indefinite;

10. In failing to give any force or effect whatsoever to Section 8(c) of the amended Act in deciding the merits of the instant petition for injunctive relief;

11. In making the Injunctive Order from which this appeal has been taken, restraining in vague and

indefinite terms lawful acts of the appellants, and thereby contravening the Constitution of the United States, Amendments I, V and XIII;

12. In exercising non-judicial powers by the issuance of said Order for Injunctive Relief contrary to Article III of the Constitution of the United States;

13. In holding that "under the unequivocal procedural mandates incorporated in the Act" the District Court is compelled to accept as true the Regional Director's allegation in the petition that he has "reasonable cause" for believing that an unfair labor practice as defined in Section 8(b)(4)(A) has occurred, without requiring the introduction of any evidence in support of said conclusion of law;

14. In holding that the District Court under Section 10(l) of the amended Act is required to, and may constitutionally "grant an appropriate injunction auxiliary to the proceedings in the Board";

15. In adopting the purported factual matter which appellee merely alleges he has "reason to believe and believes" in his petition almost *in haec verba* as a part of the Court's "Memorandum" opinion and Findings of Fact, to the exclusion of the uncontroverted facts set forth in the affidavit of Appellant Turner filed in response to the order to show cause herein;

16. In holding that the District Court had jurisdiction of the proceedings below and of appellants and possessed power to grant injunctive relief under Section 10(l) of the amended Act;

17. In holding that there is reasonable cause to believe that appellants have engaged in "unfair labor practices" within the meaning of Section 8(b)(4)(A) of the amended Act;

18. In adopting the Findings of Fact herein, which findings are contrary to and unsupported by the evidence, and omit material uncontroverted facts established by the record;

19. In adopting the Conclusions of Law herein, which conclusions are contrary to law;

20. In disregarding appellants' objections to said Findings of Fact, Conclusions of Law, and Injunctive Order herein, which objections were raised prior to the Settlement and Entry thereof;

21. In denying "in toto" appellants' Motion to Dismiss the Petition for Injunctive Relief, and refusing to dismiss said petition.

SUMMARY OF ARGUMENT.

I.

Members of labor organizations as well as other persons are constitutionally guaranteed the right to express themselves on matters of public concern without being subject to prior restraint. Denial of the right of working men to peacefully and effectively publicize the existence of a labor dispute with the purpose of persuading others to voluntarily refrain from aiding the employer party to such dispute

abridges the cognate rights of free speech and assembly embodied in the First Amendment and amounts to a denial of liberty without due process of law in contravention of the Fifth Amendment.

II.

The power of Congress to enact legislation for the general regulation of industrial relations affecting commerce is strictly limited by the provisions of the Bill of Rights.

Peacefully picketing and threatening to peacefully picket the products of an employer with whom a bona fide labor dispute is pending and against whom a lawful strike has commenced definitely comes within the constitutional safeguards of free speech.

III.

Section 8(b)(4)(A) of the Act in question cannot validly be applied to restrain peaceful picketing pursuant to a "product boycott". Said section must be held to be invalid on its face, unless peaceful picketing under the circumstances of this case is deemed excluded from its terms by the immunizing language of the "free speech proviso" of Section 8(c).

The usual presumption of constitutionality afforded legislative enactments may not be invoked in proceedings involving an attempted abridgment of free speech. Fundamental personal rights enjoy precedence not accorded to property rights and are susceptible of restriction only to prevent grave and impending public danger.

Section 8(b)(4)(A) is void for vagueness and uncertainty.

IV.

The application of Section 10(l) and the order of the District Court herein violate the inhibition of the Thirteenth Amendment against involuntary servitude.

The ancillary functions of the District Court under Section 10(l) in aid of the National Labor Relations Board's administrative duties violate Article III of the Federal Constitution.

V.

The findings of fact specified as error herein are contrary to and unsupported by the evidence, and omit material, uncontroverted facts established by the record.

ARGUMENT.

I.

THIS CASE INVOLVES ATTEMPTED OVERRIDING BY A STATUTE OF SPECIFIC AND FUNDAMENTAL CONSTITUTIONAL PROHIBITIONS.

In discussing the constitutional aspects of the case before us, we first wish to compliment the District judge who, in his Memorandum Opinion (R. 105-112) has set forth the very strongest arguments which could be advanced in support of abridgment of the right of free speech under the terms of the Taft-Hartley Act. As we shall show, we disagree categorically with the learned judge's conclusions, with the arguments in

support thereof, and with his interpretation of the authorities which he mentions.

At page 107 of the record, the District Court referred to the "very delicate constitutional issue" involved in the case, which language is immediately followed by a reference to the "significant and broad change in legislative policy" expressed in the Taft-Hartley Act. Later in his opinion, the Court characterizes the peaceful picketing shown by the pleadings and the evidence to have been carried on as "forceful technique" and "coercive" as to third parties (R. 110, 111).

Now, let us look at the constitutional picture generally. There is not a word in the evidence as to any language or acts of the pickets even remotely suggesting violence, threat of violence, forcible obstruction of ingress or egress, or any form of breach of the peace (See Point XI infra). Therefore we have a decision by the judge, from which this appeal is taken, that the mere walking up and down by a picket in a peaceful manner in the attempt to persuade those dealing with a struck employer to cease their dealings is in itself "coercive" and not the "dissemination of information" referred to in the *Thornhill* (310 U. S. at p. 88) and subsequent cases.

Previously this type of patrolling for precisely this purpose was held to be a constitutional right in April, 1940, by the decision in the *Thornhill* case. The Court does not question the validity of the *Thornhill* case, but he claims that those acts which were lawful and constitutional in 1940 are unlawful in 1948.

The judge claims, in effect, that these acts of free speech by the pickets constituted "an incitement". Now in 1925, in the *Gitlow* case (*Gitlow v. New York,* 268 U. S. 652, 45 S. Ct., 625, 69 L. Ed. 1138) Justice Oliver Wendell Holmes, in his dissenting opinion (which is now the law of the land), referred to the contention that a certain document or "manifesto" was not an exercise of the constitutional right of free speech because it was "an incitement," and Justice Holmes followed that statement with this:

> "Every idea is an incitement which offers itself for belief and, if believed, is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."

Now this statement of the law by Mr. Justice Holmes in 1925, which began to be followed by majority opinions of the Supreme Court within half a dozen years, is, according to the learned trial judge in this case, not the law in 1948.

We therefore inquire what has happened to abridge this constitutional right, and the answer of course is the passage by Congress of the *Taft-Hartley Act.*

In all of the constitutional authorities on the subject of free speech in general and of peaceful picketing in particular, it is either stated specifically and emphatically or implied as being too clear and elementary to require elaboration that no statute may abridge the rights secured by the Constitution. In some of the cases, as *A. F. of L. v. Swing,* 312 U. S. 321, 61 S. Ct. 568, 85 L.Ed.855, it was not a statute but a state policy which sought to abridge the constitutional right of

peaceful picketing. In other cases the attempted infringement of the constitutional right was by means of a statute, and in a large number of cases by a penal statute, but these statutes have been stricken down.

The learned judge does not suggest in his opinion that this particular statute, having been passed by the Congress of the United States, stands on any higher plane than the statute of a state or subdivision thereof; and of course no such contention could be made. As a matter of fact, the prohibitions of the First Amendment are aimed directly at Congress,—"Congress shall pass no law" etc.

> At page 107 of the record, the District Court said: "It is evident that unless the decisions of the United States Supreme Court indisputably show the unconstitutionality of Section 8(b)(4)(A) * * *, this court should grant an appropriate injunction * * *"

To that statement by the court of the issues involved, let us add this additional issue, "Unless the Taft-Hartley Act, and in particular the cited portions, has in some way amended the First Amendment to the Constitution, the court had no jurisdiction to issue the injunction in this case."

We wish to ask the Court to take judicial notice that the First Amendment has not been amended, and that it is still in full force and effect. We shall show that the Supreme Court of the United States has in the last two decades more and more strongly upheld

the rights secured by the First Amendment subject only to the clear and present danger rule.

II.

IF SECTION 8(b)(4)(A) SEEKS TO ABRIDGE THE RIGHT OF PEACEFUL PICKETING PURSUANT TO A PRODUCT BOYCOTT, AS IN THE CASE AT BAR, THEN SECTION 8(b)(4)(A) STANDS BEFORE THE COURT WITHOUT THE BENEFIT OF ANY PRESUMPTION OF CONSTITUTIONALITY.

As will be shown hereafter, the rights secured by the First Amendment have the special favor of the Courts for their protection—a special favor because they stand on a higher plane than rights of property. However, let us first consider the argument which will undoubtedly be made in support of Section 8(b)(4)(A), which is in question here, namely, that the section is presumed to be constitutional. We agree, of course, that the general rule is that a legislative act is presumed to be constitutional, but there is a special rule which applies to legislation seeking to infringe the provisions of the Bill of Rights, and in particular legislation which seems to abridge the rights secured by the First Amendment.

Thus, Mr. Justice Reed in the very recent decision in *United States v. Congress of Industrial Organizations,* decided June 21, 1948, ... U. S. ....., construing and applying another portion of the Labor Management Relations Act, 1947, quotes with approval the following language of earlier opinions of the high Court:

> "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve." (*Pennekamp v. Florida,* 328 U.S. 331, 346, 66 S. Ct. 1029, 90 L. Ed. 1295.)
>
> "* * * the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society will allow." (*Bridges v. California,* 314 U. S. 252, 263, 62 S. Ct. 190, 86 L. Ed. 192.)

In the leading case of *Thomas v. Collins,* 323 U. S. 516, at 529, 65 S. Ct. 315, 89 L. Ed. 436, the Supreme Court of the United States had before it a statute of the State of Texas, a statute whose validity and constitutionality had already been upheld by the Supreme Court of the State of Texas. This legislation sought to abridge, in a very mild and indirect manner to be sure, the right of assemblage secured by the First Amendment. It was not such a direct abridgement as the ordinance construed in *Hague v. Committee,* 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423, which sought to prevent absolutely a peaceful assemblage unless approved by the chief of police. However, the Texas statute, by requiring a labor organizer to register with the Secretary of State, before doing any organizing work, that is to say, before soliciting any members for the union, did interfere with and restrict the activities of a labor organizer to some extent, and the section was held unconstitutional insofar as it sought

to accomplish that purpose. The Supreme Court in that case, said:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the *usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment* * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice." (323 U.S. at p. 529, cited with approval in *United States v. Congress of Industrial Organizations, supra,* and *In re Porterfield* (April 30, 1946), 28 Cal. (2d) 91, 103, 168 P. (2d) 705.)

It must be borne in mind that the Taft-Hartley Act is an Act of Congress and therefore it comes directly within the prohibitions of the First Amendment, which is a direct and positive prohibition in the following language:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peacefully to assemble and to petition the Government for redress of grievances."

We therefore do not have before us the question involved in *In re Blaney,* 30 Cal. (2d) 643, 184 P.

(2d) 892, of a state anti-secondary boycott statute abridging freedom of speech, nor *Carlson v. California,* 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104, *Hague v. Committee, supra,* nor *In re Bell,* 19 Cal. (2d) 488, 122 P. (2d) 22, nor the *Porterfield* case, *supra,* concerning anti-labor ordinances with the same effect. We have here a situation where Congress has done precisely the thing which the First Amendment says that Congress cannot do. It is the First Amendment which is therefore directly disobeyed, and not the First Amendment as incorporated by the Fourteenth.

In *U. S. v. Carolene Products,* 304 U. S. 144, at page 154 (Note 4), 58 S. Ct. 778, 82 L. Ed. 1234:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the First ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth." (At the end citing *Stromberg v. California,* 283 U. S. 359, 369, 370, 51 S. Ct. 532, 535, 536, 75 L. Ed. 1117, 73 A.L.R. 1484; *Lovell v. Griffin,* 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, decided March 28, 1938. See also *Cantwell v. Connecticut,* 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352; *Schneider v. New Jersey,* 308 U. S. 147, 60 S. Ct. 315, 89 L. Ed. 430.)

In another recent case the Supreme Court has made it clear that these constitutional provisions mean

exactly what they say and that they cannot be overridden by legislation:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote. They depend on the outcome of no elections." (*West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 638, 63 S. Ct. 1178, 1186, 87 L. Ed. 1628.)

In another leading case the court used similar language:

> "Accordingly, in view of the *preferred position* the freedoms of the First Article occupy, statute in its present application must fall. *It cannot be sustained on any presumption of validity.*" (*Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, at 167, 64 S. Ct. 438, 88 L. Ed. 645.)

In still another recent decision involving wartime conditions where the Supreme Court might have presumed the "clear and present danger rule" to apply, the Supreme Court again denied the presumption of constitutionality to legislation abridging the Bill of Rights in *Ex Parte Mitsuye Endo,* 323 U.S. 283, at 299, 65 S. Ct. 208, 89 L. Ed. 243.

> "We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach

which we think should be made to an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. *This Court has quite consistently given a narrower scope for operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution.*"

III.

THE PERSONAL RIGHTS SECURED BY THE FIRST AMENDMENT, AND PARTICULARLY THE RIGHT OF FREE SPEECH, TAKES PRECEDENCE IN THE EYES OF THE COURT OVER PROPERTY RIGHTS, AND ARE NOT JUDGED BY THE SAME CONSTITUTIONAL PRINCIPLES.

It must be borne in mind that the rights of the employer in this case who is the charging party are property rights, pure and simple. Any detriment which he suffers from any acts of the union consists of a loss of profits, and of that alone. It has been repeatedly held that damage to an employer in such cases is *damnum absque injuria.* In one of the leading cases in California (*McKay v. Retail Automobile Salesmen,* 16 Cal.(2d) 311, 106 P.(2d) 373), the picketing which was held by the State Supreme Court as being the exercise of the right of free speech had, according to the evidence in the case, resulted in closing down the business.

The rights of the workers on the other hand, the union members, are personal rights. The right to

picket, the right to boycott, the right to work or to refrain from working:

Thornhill v. Alabama, 310 U.S. 88, at pp. 104, 105, 60 S.Ct. 890, 87 L.Ed. 1290;

A.F. of L. v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855;

Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58;

Hunt v. Crumboch, 325 U.S. 821, 65 S.Ct. 1545, 89 L.Ed. 1954.

In the recent case of *Marsh v. Alabama,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 the Court said (at page 509):

> "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment lies at the foundation of free government by free men and we must in all cases weigh the circumstances and appraise * * * the reasons * * * in support of the regulation of (those) rights."

See also *Tucker v. Texas,* 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274.

The following cases are cited by the Court in *Marsh v. Alabama* in support of the principle thus stated:

> "The constitutional protection of the Bill of Rights is not to be evaded by classifying with business callings an activity whose sole purpose

is the dissemination of ideas * * *'' (*Jones v. City of Opelika,* 316 U.S. 584, (Stone, C.J. dis.) 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290.)

''The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.'' (*Murdock v. Pennsylvania,* (Douglas, J.), 319 U.S. 105, 115, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 81).

''The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean v. American Press, supra,* (297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660); *Murdock v. Pennsylvania, supra*), as the imposition of a censorship or a previous restraint. *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. * * *

''The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government * * * But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.'' (*Follett v. Town of McCormick,* (Douglas, J.), 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938, 152 A.L.R. 317).

Members of labor organizations as well as other persons are constitutionally guaranteed the right to express themselves on matters of public concern without being subject to prior restraint.

Near v. Minnesota, Grosjean v. American Press Company, Thornhill v. Alabama, Carlson v. California, all cited *supra.*

In the *Blaney* case, discussed *infra,* 30 Cal. (2d) 643, 184 P. (2d) 892, invalidating the California anti-boycott law, it was thus said:

"Regardless of the area to which the concerted labor activity, such as picketing or boycotting may be constitutionally limited, and the facts of the case at bar as above disclosed, the statute here involved cannot stand * * * It permits the *prior censorship* of matters undeniably protected by the constitutional guarantee of free speech and free press. (See *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357.) It makes enjoinable the mere combination or agreement resulting in the refusal by employees to handle goods for their employer because of a dispute between some other employer and his employees or a labor organization."

As was stated in *Thomas v. Collins, supra:*

"* * * the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members, or others to assemble and discuss their affairs and *to enlist the support of others.*"

In the *Thomas* case, the Court reaffirmed the views expressed in the *Thornhill* case and *Hague v. Committee,* both *supra,* that the power of the state to regulate labor organizations must not trespass upon the domains set apart for free speech and free assembly, saying:

> "Where the line shall be placed in a particular application rests * * * on the concrete clash of particular interests and the community's relative evaluation of both of them and of how the one will be affected by the specific restriction, the other by its absence. *That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently,* whatever the legislative judgment, in the light of our constitutional tradition. *Schneider v. State,* 308 U.S. 147, 161. And the answer, under that tradition, can be affirmative to support an intrusion upon this domain, only if grave and impending public danger requires this."

IV.

THE RECOGNITION BY THE SUPREME COURT OF THE UNITED STATES OF THE COGNATE RIGHTS SECURED BY THE FIRST AMENDMENT AND SUBJECT ONLY TO THE CLEAR AND PRESENT DANGER RULE HAS DEVELOPED STEADILY FOR THE LAST QUARTER CENTURY.

It is extremely interesting to note that the arguments we are making in favor of the rights of free speech in general, and in particular of peaceful picketing, are neither new nor are they what might be called

radical. The right of free speech, subject only to the clear and present danger rule, goes back to *Schenck v. U. S.*, 249 U. S., 47, 39 S. Ct. 247, 63 L.Ed. 470, in the following language:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

A number of cases about that time discuss or mention this rule and the language just quoted as presented in the dissenting opinion of Mr. Justice Holmes, concurred in by Justice Brandeis in *Gitlow v. New York, supra,* 268 U. S. at pp. 672-673. This was the same Oliver Wendell Holmes who while on the Supreme Bench of Massachusetts, away back in 1896 in another dissenting opinion, recognized and upheld the right of picketing by a union as an act of competition with the employer. This dissenting opinion, cited by the Supreme Court of California in *McKay v. Retail Automobile Salesmen, supra,* 16 Cal. (2d) at p. 321, is now the law of the land, the case being *Vegelahn v. Guntner,* 167 Mass. 92, 36 L.R.A. 722.

The concurring opinion of Mr. Justice Brandeis in *Whitney v. California,* 274 U. S. 357, 374, 47 S. Ct. 641, 71 L.Ed. 1095, amplified the clear and present danger test by declaring that "Fear of serious injury cannot alone justify suppression of free speech and assembly."

The *Gitlow* case was followed by *Stromberg v. California,* 283 U. S. 359, 51 S. Ct. 532, 75 L.Ed. 1117, in

which the Supreme Court set aside a statute of the State of California which would have prohibited the display of a red flag as being a denial of constitutional rights. This opinion was written by Chief Justice Hughes, concurred in by Justices Holmes, Brandeis, Roberts, Vandervanter and Sutherland, with Justices McReynolds and Butler the only dissenters. Next came the epochal decision written by Chief Justice Hughes, in which a statute of the State of Minnesota was set aside on the ground that in attempting to permit an injunction against the publication of a libel it would have made possible the suppression of a scurrilous and defamatory newspaper. (*Near v. Minnesota, supra.*) Chief Justice Hughes upheld the constitutional right of free speech in elaborate, voluminous and eloquent language. Incidentally, in this case there were four dissenters: Justices Butler, Vandevanter, McReynolds and Sutherland.

The next case in the line is *Grosjean v. American Express, supra,* where, in a unanimous opinion, the Supreme Court set aside a statute of Huey Long's legislature in the State of Louisiana which would have abridged freedom of the press by the levy of unreasonable taxes.

Next follows *De Jonge v. State of Oregon,* 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278, which was a sedition case involving the criminal syndicalism law of Oregon. Although the opinion describes what may well have been a seditious meeting participated in by Communists and others with no love for our Constitution, still the particular defendant who was prosecuted was

not shown to have done any unlawful act (other than to attend and participate in a peaceful meeting), and the Supreme Court in a unanimous opinion set aside his conviction. Chief Justice Hughes for the Court said (at page 283):

> "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution." (Citing the *Gitlow, Stromberg, Near* and *Grosjean* cases just referred to.)

The Chief Justice continued,

> "The right of peaceful assembly is a right cognate to those of free speech and free press and is equally fundamental."

Next is *Herndon v. Lowry,* 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066, another sedition case where it appeared there was an actual plot against the United States Government which might have led to rebellion and the secession of certain states or parts of states. But there again it appeared that no unlawful act was committed by the defendant, other than as comprehended in free speech and assembly, so his conviction was set aside by an opinion by Mr. Justice Roberts, with Justices Vandevanter, Sutherland and Butler dissenting. In this case the clear and present danger rule is emphasized as follows:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justifica-

> tion in a reasonable apprehension of danger to organized government."

Now we come to the first case in which picketing is mentioned—*Senn v. Tile Layers Protective Union,* 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229, in which the action of the Courts of Wisconsin, permitting the picketing by the tile layers union of a tile layer who insisted on doing his own work and in refusing to hire a journeyman was approved. Mr. Justice Brandeis wrote the opinion, with Justices Butler, Vandevanter, McReynolds and Sutherland dissenting. In this case, Mr. Justice Brandeis used this language, which has been frequently quoted in subsequent cases,

> "Members of a union might without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

Next follow two cases in which the distribution of handbills was upheld as a constitutional right even though in violation of local ordinances (*Lovell v. City of Griffin,* 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (a unanimous decision), and *Schneider v. New Jersey,* 308 U. S. 147, 60 S. Ct. 315, 89 L. Ed. 430, in which in one instance the handbills were distributed by a picket (Justice McReynolds being the sole dissenter).

Now we come to *Thornhill v. Alabama,* frequently referred to herein in which peaceful picketing in violation of a penal statute of the State of Alabama was held as a constitutional right. This was a unanimous

decision, except for the dissent of Justice McReynolds. The companion case was *Carlson v. California,* supra, the same ruling involving a county statute with the same dissent. An interesting thing about the *Thornhill* decision is that since the Court had no line of cases to refer to in which the right of picketing had been upheld as a constitutional right, except the passing reference of Justice Brandeis in the *Senn* case, which might have been dictum, and the circumstance referred to in the *Schneider* case, the Supreme Court without hesitatiton and without dissent except by Justice McReynolds, upheld the right of peaceful picketing as a constitutional right, citing and relying upon the following authorities referred to herein: the *Schneider, Lovell, De Jonge, Grosjean, Near, Stromberg* and *Gitlow* cases, showing the recognition by the Supreme Court of the cognate character of all of these rights protected by the First Amendment—assembly, free speech and free press.

In the March 1948 number of the California Law Review appears a very interesting 40 page article entitled, *"Where Are We Going with Picketing?"* This article discusses the constitutional decisions of the State of California but lays particular stress on the decisions of the Supreme Court of the United States, some of which have been referred to herein. This article discusses also the constitutional cases involving the organization known as *Jehovah's Witnesses,* nineteen decisions, from *Schneider v. State,* in 308 *U. S.* down to *Marsh v. Alabama,* 326 U. S. 501. These cases involved freedom of worship combined in the

various cases with either freedom of speech, freedom of the press, or freedom of assembly. Some of the cases will be referred to later.

Next in line come two cases decided on the same day: *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200, and *A. F. of L. v. Swing, supra,* 312 U. S. 321. In the *Meadowmoor* case the right of peaceful picketing was upheld but an injunction granted and approved by the Illinois courts was affirmed because of the imminent danger of a recurrence of extreme violence which had gone on over several years. The Supreme Court made it clear that as soon as the pressure of the danger of violence should be removed, then the injunction should be set aside. In other words, the *Meadowmoor* case absolutely upheld the right of peaceful picketing.

In *A. F. of L. v. Swing, supra,* it appeared that the beauticians were picketing a beauty shop for the purpose of organization, no member of the union being employed therein. The Illinois courts held, according to the public policy of the state as approved by its Supreme Court, that picketing could not be permitted except in a dispute involving an employer and his own employees. The Supreme Court said (312 U. S. at pages 325, 326):

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the

> state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."

In connection with this language of the Supreme Court in the *Swing* case to the effect that no statute may limit the allowable area of a labor dispute to an employer and his own employees, we find (on page 205 of the record herein) that this was the precise contention made by the appellee in this case where the learned and active attorney for the General Counsel said:

> "I think the *Ritter's Cafe* case, decided in 1942, furnishes us with a basis for the argument that Congress may limit industrial conflict so that the conflict takes place only between the employer immediately concerned and his employees, and so as to prevent the unions from bringing pressure to bear upon the employees of another employer so that they will engage in a concerted refusal to handle the goods of the employer with whom the union is having the real dispute, and, therefore, force the second employer to cease doing business with that particular employer."

This is undoubtedly the basic contention of the prosecution in this case.

The next case in the development of this recognition of constitutional rights is *Bridges v. California, supra,* 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192, where the

Supreme Court of California was overruled in a case involving the right of free speech, it being alleged that the free speech constituted contempt of court. In the case of a labor leader and of a conservative newspaper (the Los Angeles Times) the right of comment even upon pending and undecided cases was upheld on constitutional grounds under the clear and present danger rule:

> "* * * the 'clear and present danger' language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck v. United States, supra; Abrams v. United States,* 250 U. S. 616, 40 S. Ct. 17, 63 L. Ed. 1173; under a criminal syndicalism act, *Whitney v. California, supra;* under an 'anti-insurrection' act, *Herndon v. Lowry, supra;* and for breach of the peace at common law, *Cantwell v. Connecticut, supra.* And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is 'destruction of life or property, or invasion of the right of privacy.' *Thornhill v. Alabama,* 310 U. S. 88, 105, 60 S. Ct. 736, 745, 84 L. Ed. 1093.
>
> "Moreover, the likelihood, however great that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis,

J., concurring in *Whitney v. California, supra,* 274 U. S. at page 374, 47 S. Ct. at page 647, 71 L. Ed. 1095; it must be 'serious', Id., 274 U. S. at page 376, 47 S. Ct. at page 648, 81 L. Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. State,* 308 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155.

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press'. It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

This luminous statement of the clear and present danger has been followed in subsequent cases and has never been questioned in the slightest degree. It must therefore be recognized as the law and must be applied by the Court in the case at bar.

The next two cases are frequently misunderstood and frequently misquoted and misinterpreted. The

ruling in the two cases, however, is very clear. In the *Ritter's Cafe* case (*Carpenters' Union v. Ritter's Cafe,* 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143), it was held that in a labor dispute picketing might be prohibited where directed against a business having no economic nexus with the business against which the original dispute was pressed. The *Wohl* case (*Bakery Wagon Drivers Local v. Wohl,* 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178), held that picketing of a product of a struck employer is within the allowable area and must be permitted. The district judge herein (R. 111) states that the *Ritter's Cafe* case was decided on the ground that the picketing there was a form of "forceful technique". As a matter of fact, the decision had nothing whatever to do with force of any kind, and the sole basis of the decision was that the fully unionized cafe which was being picketed was entirely outside of the nexus of the dispute which arose over the construction job of a building a mile and half distant. As applied to the case at bar, these two decisions are controlling. In the *Wohl* case the Court upheld picketing of a product, even in violation of the statutes of the state of New York. In the case at bar, the Court must uphold the picketing of a product even though prohibited by a statute of commerce.

A significant feature of the *Ritter's Cafe* decision is that it does not refer in any way to the clear and present danger rule, and it is interpreted by opposing counsel in the case at bar as furnishing a basis for the limiting of picketing to a dispute between an employer and his own employees.

It is very significant that the next case in line (*Cafeteria Employees Union v. Angelos,* 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58, decided a year and a half after the *Ritter's Cafe* case and being a unanimous decision of the Court) repeats the language of the *Swing* case and holds that a statute may not limit the area of an industrial dispute to an employer and his own employees.

Now we come to the very important case of *Thomas v. Collins, supra,* in which the Court confirmed several fundamental principles: First, that a statute abridging the right secured by the First Amendment has no presumption of constitutionality in that the usual presumption is balanced by the favor accorded these constitutional rights; second, that these personal rights take precedence over property rights. Again, that these rights may be interfered with only under the clear and present danger rule. At page 530 the Court said:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It

is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *De Jonge v. Oregon,* 299 U. S. 353, 364, 57 S. Ct. 255, 259, 81 L. Ed. 278, and therefore are united in the First Article's assurance. Cf. 1 *Annals of Congress* 759-760."

V.

THE PICKETING COMPLAINED OF HEREIN WAS FOR A LAWFUL OBJECT AND WAS IN THE EXERCISE OF CONSTITUTIONAL RIGHTS.

In *Thornhill v. Alabama, supra,* the picketing therein described which was for the purpose of enforcing a boycott against a certain struck establishment and which was moreover in violation of a final statute (31 U. S. at pp. 91, 92) was held to be the exercise of a constitutional right. In other words, picketing pursuant to a labor dispute directed at the premises of the employer or at the products of the employer is a constitutional right.

Bakery Wagon Drivers' Local v. Wohl, supra; McKay v. Retail Auto Salesmen's Union, supra, 16 Cal. (2d) at p. 319, 106 P. (2d) 373;

Smith Metropolitan Market v. Lyons, 16 Cal. (2d) 389, 394, 106 P. (2d) 414;

Shafer v. Registered Pharmacists Union, 16 Cal. (2d) 379, 382, 106 P. (2d) 403;

Fortenbury v. Superior Court, 16 Cal. (2d) 405 and 408, 106 P. (2d) 411.

See also

Park & Tilford Import Corp. v. Int'l Brotherhood of Teamsters, 27 Cal. (2d) 599, 608, 165 P. (2d) 891, 162 A.L.R. 1426.

"It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." (310 U. S. at p. 104.)

Picketing for a purpose reasonably related to employment conditions and to the purposes of collective bargaining is picketing for a lawful purpose, as per the authorities last cited. In *A. F. of L. v. Swing, supra,* the Supreme Court stated the purpose in still stronger terms in this language:

"Communication by such employees of the facts of a dispute *deemed by them to be relevant to their interests* can no more be barred because of the concern for economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case." (312 U. S. at p. 326.)

This primary purpose or objective of picketing, that is as a demonstration for the protection of the interests of the workers in connection with their employment has been repeatedly upheld in the face of a contention that in the course of the picketing some other incidental purpose or objective appeared or was charged to exist.

Speaking frankly, as ex-Justice Byrnes would say, this contention of "lawful purpose" for picketing has been used and misused to justify the abridgement of this constitutional right. The contention which is made in the case at bar is that because Congress passed a statute which apparently prohibited picketing of the product of a struck employer, therefore such picketing immediately *ipso facto* becomes unlawful as "being against public policy". Now the Supreme Court of the United States has been very definite in indicating exactly what regulation of the exercises of these constitutional rights is allowable and what form of prohibition of the exercise of these rights cannot be tolerated. Briefs in opposition to these constitutional rights always refer to general statements by various Courts to the effect that these rights secured by the First Amendment are not absolute but are subject to regulation. However, that statement does us no good in the resolution of the issues before the Court in this case. What we are concerned with is what form of regulation is allowable and what extent of regulation or prohibition has been definitely disapproved by the Court.

As pointed out above, it is held that economic action, including boycott and picketing, is justifiable where it is reasonably related to employment relations and the purposes of collective bargaining. When this is the primary purpose of the economic action, the action is legal and it does not become illegal because some other incidental purpose is being achieved, as, for instance, damage to the employer or to some one allied with him, nor does it become illegal because of the passage of some statute purporting to prohibit the activity. In *A. F. of L. v. Swing, supra,* the publicizing of a labor dispute by picketing is held to be lawful where the subject of the dispute is "deemed" by the union to be relevant to its interests even though the economic action was absolutely prohibited by the policy of the particular state.

In the case of *Carpenters Union v. Ritter's Cafe, supra,* the Texas courts disapproved of picketing outside of the nexus of the dispute, and the Supreme Court of the United States with strong dissenting opinions refused to interfere with this action of the Texas courts. While this case has apparently been disapproved by subsequent decisions (*Cafeteria Employees v. Angelos, supra; Thomas v. Collins, supra*), still, if it be accepted as stating the law applicable to the case at bar, it does no more than to disapprove of a sympathetic boycott or picketing pursuant thereto while definitely upholding the right to picket an unfair product (315 U. S. at 727) which is exactly what the defendants are contending for here.

In some other cases, including *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board,* 315 U. S. 740, 748, 62 S. Ct. 820, 86 L. Ed. 1154, and one or two other cases arising in Wisconsin, the state's police power, that is to say, the right of the state to keep the peace, has been upheld.

The question of whether the picketing here was for an unlawful purpose does not require lengthy or numerous citations. The picketing here was peaceful, in connection with a legitimate labor dispute, and was directed at the employer and at the products of the employer. This precise form of product boycott was involved in *Bakery and Pastry Drivers v. Wohl, supra,* approved in *Carpenters Union v. Ritter's Cafe, supra,* in the case of *Fortenbury v. Superior Court, supra,* 16 Cal. (2d) 405, 106 P. (2d) 411, and was the same type of picketing—except that it was entirely peaceful—as that involved in *Milk Wagon Drivers v. Meadowmoor Dairies, supra,* where the picketing was disapproved only because of its manner.

This picketing has taken place in violation of a statute purporting to prohibit picketing pursuant to a boycott. That was precisely the situation in *Thornhill v. Alabama* where the picketing was held to be a constitutional right.

To argue that this picketing was for an unlawful purpose is simply to contend that a statute may prohibit what the Constitution permits.

VI.

SECTION 8(b)(4)(A) OF THE ACT IN QUESTION CANNOT VALIDLY BE APPLIED TO RESTRAIN PEACEFUL PICKETING PURSUANT TO A PRODUCT BOYCOTT.

As District Judge Rifkind said recently with respect to Section 8(b)(4)(A) in *Douds v. Metropolitan Federation of Architects,* decided January 26, 1948, 75 F. Supp. 672:

> "The Taft-Hartley Act has thus far had but little judicial attention. * * * No case thus far has reached an appellate court. Even cursory examination of the stated facts and the quoted portions of the Act reveals that the case bristles with questions of constitutional law, statutory construction and practical application. * * *
>
> "Certainly it is an object of very many strikes and picket lines to induce a reduction in the struck employer's business by an appeal to customers—'any person'—to cease dealing with the employer. This is one of the most conspicuous weapons employed in many labor disputes. *The effect of a strike would be vastly attenuated if its appeals were limited to the employer's conscience.* I shall proceed on the assumption, warranted by the history of the Act, that it was not the intent of Congress to ban such activity, although the words of the statute, given their broadest meaning may seem to reach it.
>
> "* * * recourse may be had to the *legislative history* to discover the mischief which Congress intended to remedy * * * with the aid of the glossary provided by the law of secondary boycott * * *"

The conference agreement adopted the provisions of the Senate version of Section 8(b), with clarifying changes and with one addition to the category of unlawful objectives of strikes and boycotts. "Under clause (A)—[of Section 8(b)(4)] strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in *a strike against employer A for the purpose of forcing that employer to cease doing business with employer B.* Similarly, it would not be lawful for a union to *boycott employer A because employer A uses or otherwise deals in the good of, or does business with, employer B.*" (House Conference Report No. 510 on H. R. 3020, June 3, 1947, p. 43.)

In other words, this clause is aimed at the true secondary boycott, where full scale economic sanctions are placed by a union against an employer with whom no dispute exists for the purpose of compelling him to shun commercially the firm where the primary dispute exists. (Senate Report No. 105 on S. 1126, April 17, 1947, p. 22.) While the House provision differed from the Senate version which was adopted, the problem was similarly described by the Hartley Committee on Education and Labor in these terms:

> "His (the employer's) business on occasions have been virtually *brought to a standstill* by disputes

to which he has not been a party, and in which he had no interest."

(House Report No. 245 on H. R. 3020, April 11, 1947, p. 5.)

Senator Pepper contended that "the language would forbid one man or one agent of a labor union going to the employees of another employer working on a product put out by a manufacturer who would be unfair to them in their opinion and attempting to persuade or induce those workers not to handle the output of the factory in which there was a disagreement with the workers." To which, Senator Taft immediately replied—

"I do not quite understand the case which the Senator has put. *This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees.*"

(93 Daily Cong. Rec. 4322-4323, 4/20/47.)

"Examination of these expositions of Congressional purpose," says Judge Rifkind, "indicates that the provision was understood to outlaw what was theretofore known as a secondary boycott. It is to the history of the secondary boycott, therefore, that attention should be directed."

Under the modern trend of decision, a clear distinction has been drawn between picketing the products of the struck plant, and boycotting or striking a customer, supplier, or distributor of the struck plant.

(Gromfine, *Labor's Use of the Secondary Boycott* (1947), 15 Geo. Wash. L. Rev. 327; *Goldfinger v. Feintuch,* 276 N. Y. 281, 11 N. E. (2d) 910; *Fortenbury v. Superior Court,* 16 Cal. (2d) 405, 106 P. (2d) 411.)

In terms of the unmistakable trend in the law of boycotts, the legitimate interests of the labor union in prosecuting its dispute and the "unity of interest" between the manufacturer and the distributor are both relevant to the construction and applicatiton of this legislation. (Cf. Senate Minority Report No. 105, Pt. 2, on S. 1126, April 22, 1947, p. 20; 93 Daily Cong. Rec. 4156, 4/25/47.)

The act of picketing the Sealright finished products at the Los Angeles-Seattle Motor Express, Inc., and of picketing the Sealright paper (consigned by the employer's New York plant to the Los Angeles plant for manufacturing goods under strike conditions), peacefully and without interference with the normal course of business at either of these two concerns cannot be held to constitute an unlawful "secondary boycott" within the meaning of Section 8(b)(4)(A). Nor can it properly be said that such peaceful picketing is "the type of coercion that is attended with serious repercussions and dire consequences upon the interests of the two strangers of the labor dispute between Sealright and the Union". (R. 110-111.)

In the recent decision of the high Court in *United States v. Congress of Industrial Organizations,* decided June 21, 1948, ... U. S. ....., construing and applying another portion of the Labor Management Relations Act, 1947, Mr. Justice Reed said:

> "The purpose of Congress is a dominant factor in determining meaning. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion."

The District Court herein condemns picketing of the products of Sealright Pacific Ltd. "as a form of forcible technique that has been held to be subject to restrictive regulation by the State in the public interest *on any reasonable basis.*"

This holding ignores the clear statement of the Supreme Court in *West Virginia State Board of Education v. Barnette, supra,* that—

> "The right of a State to regulate, for example, a public utility, may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a *'rational basis'* for adopting. But freedom of speech and press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

VII.

SECTION 8(b)(4)(A) MUST BE HELD INVALID ON ITS FACE, UNLESS PEACEFUL PICKETING UNDER THE CIRCUMSTANCES OF THIS CASE IS DEEMED EXCLUDED FROM ITS TERMS BY THE IMMUNIZING LANGUAGE OF THE "FREE SPEECH PROVISO" OF SECTION 8(c).

Where regulation or infringement of liberty of discussion and the dissemination of information and opinion are involved, there are special reasons for testing the challenged statute on its face. (*Jones v. Opelika,* 316 U. S. 584, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290.)

As was said in *Thornhill v. Alabama, supra,* 310 U. S. 86, 96, 60 S. Ct. 736, 84 L. Ed. 1093, concerning a statute prohibiting picketing:

> "There is a further reason for testing the section on its face. Proof of the abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas."

The existence of such a statutory provision "which does not aim specifically at evils within the allowable area of state control, but on the contrary sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech" inevitably "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview".

Carlson v. California, supra;

Schneider v. New Jersey, supra, 308 U. S. 147, 162-165, 60 S. Ct. 315, 89 L. Ed. 430;

Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423;

Lovell v. Griffin, 303 U. S. 444, 451, 58 S. Ct. 666, 82 L. Ed. 949;

Stromberg v. California, 283 U. S. 359, 369, 51 S. Ct. 532, 75 L. Ed. 1117.

If certain provisions of a statute, or particular applications of broad statutory language operate to prohibit peaceful picketing, the entire section is invalid even though it may also prohibit acts that may properly be made illegal. Thus, on October 3, 1947, the Supreme Court of California invalidated the so-called "Hot Cargo and Secondary Boycott Act" of this State (California Labor Code §§ 1131-1136) in a 6-to-1 decision, previously cited herein: *In re Blaney,* 30 Cal. (2d) 643, 651-653, 184 P. (2d) 892. (See also *In re Porterfield,* 28 Cal. (2d) 91, 168 P. (2d) 706, 176 A.L.R. 675; *In re Bell,* 19 Cal. (2d) 488, 495, 122 P. (2d) 22.)

There the California Supreme Court discusses in detail the application of decisions of the Supreme Court of the United States to the state enactment rendering unlawful and subject to injunctive restraint:

"* * * any combination or agreement resulting in a refusal by employees to handle goods or to perform any services for their employer because of a dispute between some other employer and his employees or a labor organization * * *

"* * * any combination or agreement to cease performing, or to *cause any employee to cease*

> *performing any services for any employer,* or to cause any loss or injury to such employer, or to his employees, *for the purpose of inducing or compelling such other employer to refrain from doing business with, or handling the products of any other employer, because of a dispute between the latter and his employees or a labor organization* * * *"
>
> (California Labor Code § 1134.)

As the single dissenting justice correctly pointed out:

> "It may be noted that by the enactment of the Labor Management Relations Act of 1947 (Ch. 120, Public Law 101), including amendment of the National Labor Relations Act, the Congress had declared 'secondary boycott' operations by concerted action to be an unfair labor practice with provisions for civil remedies. *That legislation is cast in language the same in substance and effect as section 1134 here under consideration.*"
>
> (Dissenting opinion of Associate Justice Shenk, 30 Cal. (2d) at p. 675.)

Associate Justice Carter, citing numerous United States Supreme Court constitutional authorities, summarized the vice of the California law approximating Section 8(b)(4)(A) in these words:

> "The Legislature manifestly sought in the instant case to prohibit every form of boycott, including some kinds which are occasionally characterized as 'primary'. The deliberately chosen language, covering all such activities in general terms, with no attempt at segregation or classification, leaves this court with no alternative but to nullify the

act. Only by a carefully drawn statute which separately treats the various forms of concerted action loosely termed 'secondary boycotts' can the Legislature hope to accomplish the object of regulating those forms which may ultimately be held to be within its constitutional power."

(30 Cal. (2d) at p. 658.)

Section 8(b)(4)(A) must, under these same Supreme Court decisions, be declared invalid on its face, unless peaceful picketing under the circumstances herein is deemed excluded from its terms by the immunizing language of Section 8(c). The District Court in the instant case failed to give Section 8(c) any effect whatsoever, or to rule as to its applicability to Section 8(b)(4)(A).

Appellants are familiar with the long-standing canon of judicial construction that when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional, and by the other valid, the Courts will adopt that construction which will save the statute from constitutional infirmity. Only recently in *United States v. Congress of Industrial Organizations, supra,* the Supreme Court quoted this canon of construction in considering Section 304 of the Taft-Hartley Act, opining:

"* * * it is clear that Congress was keenly aware of the constitutional limitations on legislation and of the *danger of the invalidation by the courts of any enactment that threatened abridgement of the freedoms of the First Amendment.* It did not want to pass any legislation that would

> threaten interferences with the privileges of speech or press or that would undertake to supersede the Constitution. The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality."

Confronted with this same problem of construction in passing upon a proposed application of Section 8(b)(4)(A) requested by the Regional Director for the Second Region of the Board, in proceedings for injunctive relief under Section 10(1), District Judge Rifkind said:

> "It must be apparent that a construction of the Act which outlaws the kind of union activity here involved would almost certainly cast grave doubts upon its constitutionality. *It is preferable to interpret the disputed section so as to restrain only that kind of union activity which does not enjoy constitutional immunity.*"
>
> (*Douds v. Metropolitan Federation of Architects, supra,* 75 F. Supp. 672.)

The legislative history of Section 8(c) makes it plain that Congress had no intention of interfering with the normal rights of either an employer or of his employees and their union, to effectively present views, arguments and opinions in the course of a labor controversy. (See for example, 93 Daily Cong. Rec. 4141, 4/25/47 where Senator Taft states, "The provision regarding free speech applies both to employer and employee". Also, statements of Senators McClellan, Morse, and Taft, at 93 Daily Cong. Rec. 5094-

5095, 5/9/47; House Report No. 245 on H. R. 3020, April 11, 1947, p. 6.)

Prior to the enactment of the Labor Management Relations Act of 1947, the Courts construing Section 8(1) of the Wagner Act of 1935, held that an anti-union statement of an employer to his employees, standing alone, even if made on the eve of a representation election, was protected fully by the First Amendment and did not therefore constitute a violation of the statute, if the statement contained no threats of reprisal or promises of rewards. (*N. L. R. B. v. Virginia Electric & Power Company,* 314 U. S. 469, cited *infra* in *Thomas v. Collins; N. L. R. B. v. American Tube Bending Co.* (C.C.A. 2d), 134 F. (2d) 993, cert. den. 320 U. S. 768. See also *Matter of Bausch and Lomb Optical Co.,* 72 N.L.R.B. No. 21.)

Section 8(c) not only established in statutory form the decisional law eliminating as an unfair labor practice expressions of opinions, or argument in any form by an employer to his employees (provided it contained no threats or promises) and extended it to similar statements by employees and their unions—it declared that the expression or dissemination of such views, argument, or opinion, whether in written, printed, graphic or visual form, shall not be *evidence* of an unfair labor practice, *"under any of the provisions of this Act".*

As the Supreme Court of the United States said in *Thomas v. Collins,*

> "The First Amendment is a charter for government not for an institution of learnings. 'Free

trade in ideas' means *free trade in the opportunity to persuade to action,* not merely to describe facts.

"Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

"Accordingly, decision here has recognized that *employers' attempts to persuade to action* with respect to joining or not joining unions are within the First Amendment's guaranty. *National Labor Relations Bd. v. Virginia Electric & P. Co.,* 314 U. S. 469 * * * When to this persuasion other things are added which bring about *coercion,* or give it that character, the limit of the right has been passed. But short of that limit, *the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right.* Of course espousal of the cause of labor is entitled to no higher protection than the espousal of any other lawful cause. It is entitled to the same protection." (323 U. S. at 537.)

It is significant that the language of Section 8(c) closely approximates the references in *Thornhill v. Alabama* and *Carlson v. California* to appropriate methods for "the dissemination of information concerning the facts of a labor dispute". In the *Thornhill* case, the Supreme Court refers to "the means used to publicize the facts of a labor dispute, whether *by printed sign, by pamphlet, by word of mouth,* or *otherwise*". The *Carlson* case holds that "The *carrying of signs and banners,* no less than the raising of a flag, is

a natural and appropriate means of conveying information on matters of public concern", citing *Stromberg v. California, supra,* and refers to "appropriate means, whether *by pamphlet, by word of mouth* or *by banner*", which is certainly equivalent to the *"written, printed, graphic* or *visual form"* of expression contemplated by Section 8(c).

A thorough search of the record herein will fail to disclose any evidence to sustain a finding that *"orders, force, threats or promises of benefit"* were employed by members of appellant Local 388 at any time to induce or encourage the employees of the trucking concern and terminals company not to transport or handle Sealright goods. There is not a single instance where any *"threat of reprisal, force, or promise of benefit"* characterized the picketing of the Sealright products, or the statements made in connection therewith. (As a matter of fact, the mention of "promise of benefit" in Section 8(c) would indicate that the language was meant to apply to employers rather than pickets.)

Moreover, as has already been pointed out, the picketing in question did not materially affect or interfere with the normal business being conducted at those concerns, and there was no intention on the part of the strikers to physically or otherwise obstruct the operations at those locations, or to picket any merchandise other than Sealright products.

Thus, unable to bring this picketing of the Sealright products within the exception clause of Section 8(c), appellee contended, and the District Court held that

such picketing is *"a forcible technique"*. In effect, this holding seeks to turn back the hands of the clock and to revive early judicial pronouncements, long since overruled that *"there can be no such thing as peaceful picketing"*. (*Atchison etc. v. Gee,* 139 Fed. 582; see also *Pierce v. Stablemen's Union,* 156 Cal. 70; *Rosenberg v. Retail Clerks' Assn.,* 39 Cal. App. 67, and *Moore v. Cooks Union,* 39 Cal. App. 538, all expressly renounced in *Lisse v. Local Union,* 2 Cal. (2d) 312, 41 P. (2d) 314, and *McKay v. Retail Automobile Salesmen's Union, supra.*)

The charge originally filed before the Board (R. 27-30) *contains no reference to threats of reprisal or force or promise of benefit.* However, the petition for injunction (R. 2-8) based directly upon the charge has inserted in it (R. 5 and 6) the words above quoted, that is to say, an allegation that the pickets used force, threats, *or* promises of benefit, all without the slightest evidentiary support. In fact, the insertion of those words in the petition and in the findings of the Court (R. 136 and 137) is just a little bit unfair. It is evident that the only purpose of inserting those words was to attempt to deprive the pickets of the protection which appears to be specifically granted by the statute. In fact, the opinion of the Court (R. 104, 105) contains this very language as tending to support the correctness of the injunction and the jurisdiction of the Court to grant it.

In the leading case upholding the constitutional right of peaceful picketing (*Thornhill v. Alabama, supra*), the picketing there upheld as a constitutional

right (with elaborate citations of authority) describes precisely the acts of the pickets as immunized by the language of Section 8(c). The picketing is there referred to as publicizing a labor dispute. (310 U. S. at p. 102.) The intent of the picketing is referred to at page 100, namely, "to hinder, delay or interfere with the lawful business" and the effects, that is, actual interference with the business, are referred to at pages 104, 105.

At page 111 of the record herein the District Court refers to the concurring opinion of Mr. Justice Douglas in the *Wohl* case (315 U. S. at p. 775) and states that Mr. Justice Douglas therein "delineates the evils of the secondary boycott * * *" Now, the facts are that the *Wohl* case involved the boycott of a product which is not generally referred to as a secondary boycott, although it is so denominated by the district judge in the case at bar. The Supreme Court with *no dissent* approved the product boycott carried on in the *Wohl* case. And the language of Mr. Justice Douglas, quoted by the district judge here and quoted in many anti-picketing opinions and briefs, was used in approval of the product boycott found to exist in the *Wohl* case.

The quotation taken from the concurring opinion of Mr. Justice Douglas in *Bakery Wagon Drivers v. Wohl, supra,* reads as follows:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another.

quite irrespective of the nature of the ideas being disseminated. *Hence those aspects of picketing make it the subject of restrictive regulation.*" (R. 111-112, quoting from 315 U. S. at p. 776.)

The paragraph immediately following in the quoted opinion was omitted by the District Court, although it amounts to a definite qualification of the language reproduced, saying:

"*But* since 'dissemination of information concerning the facts of a labor dispute' is constitutionally protected, a State is not free to define 'labor dispute' so narrowly as to accomplish indirectly what it may not accomplish directly. That seems to me to be what New York has done here. Its statute (Civil Practice Act §867a) as construed and applied in effect eliminates communication of ideas through peaceful picketing in connection with a labor controversy arising out of the business of a certain class of retail bakers. But the statute is not a regulation of picketing *per se,* narrowly drawn, of general application, and regulating the use of the streets by all picketeers. In substance it merely sets apart a particular enterprise and frees it from all picketing. If the principles of the *Thornhill* case are to survive, I do not see how New York can be allowed to draw that line."

As a matter of fact, in the *Thornhill* case itself, the Court recognized "the power of the State to set the limits of permissible contest open to industrial combatants" but quickly added that "It does not follow that the state in dealing with the evils arising from industrial disputes may *impair* the *effective* exercise

of the right to discuss freely industrial relations which are matters of public concern".

The authority of the *Wohl* decision in upholding on constitutional principles the right to conduct a product boycott is further emphasized in the *Ritter's Cafe* case, *supra,* decided the same day and reported at 315 U. S. 722. In that case the Supreme Court of the United States refused to interfere with action of the Courts of Texas in prohibiting picketing of a fully unionized cafe in a dispute over a construction job located one and a half miles distant. At page 727 of the opinion the Court goes to the trouble to reaffirm the *Wohl* case, decided on the same day, as illustrating the permissible limits of picketing. In other words, the ruling of the Court in the *Wohl* case, concurred in by Mr. Justice Douglas and by all the other justices who participated, is as far as possible from the implication of the District Court (R. 111) with reference to the "evils of the secondary boycott". In other words, according to the ruling of the Supreme Court, a product boycott in the *Wohl* case was lawful and constitutional. Therefore, since the Constitution remains the same, the product boycott in the present case is lawful and constitutional, and the only argument that it is unlawful and unconstitutional must be based on the contention that in some way the Taft-Hartley Act is more potent than the Constitution itself.

As stated above, we contend that the provisions of Section 8(c) protects the pickets in their product boycott, if, in fact, they needed any statutory protection

in view of the explicit rulings of the Supreme Court of the United States and in the plain language of the First Amendment. In the light of the *Thornhill* decision and others which followed, the peaceful picketing constituted the "expressing" of "views, argument or opinion" and "dissemination thereof". If it be conceded or held that Section 8(c) is to be read in connection with the various provisions of Section 8(b), then Sections 8(b) and 8(c) in prohibiting acts which Congress may or may not have had the right under the Constitution to prohibit certainly do not prohibit the exercise of the right of free speech. Under that interpretation this portion of the statute may stand, but of course in that case the injunction cannot stand. The General Counsel, therefore, may have it either way. If he is willing to concede that Section 8(c) protects the right of free speech of the pickets as well as the employer, then he is not entitled to the injunction; while if he contends that Section 8(b) must be read without the protection of Section 8(c) and if he further contends that Section 8(b) must also be construed without the protection of the First Amendment, then those portions of Section 8(b) are clearly unconstitutional.

VIII.

SECTION 8(b)(4)(A) IS VOID FOR VAGUENESS AND UNCERTAINTY.

A. The terms of Section 8(b)(4)(A), which are incorporated in the injunctive order herein appealed from almost verbatim, are violative of due process of law because they are vague, indefinite, and uncertain.

Mr. Justice Rutledge, concurring in the very recent decision in *United States v. Congress of Industrial Organizations, supra,* sets forth an extremely learned exposition of the principle of constitutional law indicating that *"blurred signposts" to illegality, will not suffice to create it.*

So far as the guarantees of the First Amendment are concerned, "* * * statutes restrictive of or purporting to place limits to those freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb" and "* * * the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation".

The District Court herein holds that Section 8(b)(4)(A) is not unconstitutionally vague or uncertain, citing *United States v. Petrillo,* 332 U. S. 1, 67 S. Ct. 1538, 91 L. Ed. 1403. (R. 109.) The statute there involved (Act of April 16, 1946, 60 Stat. 89, ch. 138, 47 U.S.C.A. §506) refers to "the use or express or implied threat of the use of force, violence, intimidation or duress or implied threat of the use of other means to coerce, compel or constrain" an employer to hire unneeded employees. In the *Petrillo* case, the Su-

preme Court pointed out that the "gist of the offense here charged in the statute and in the information" is that the defendant "willfully, by the use of force, intimidation, duress *and* by the use of other means did attempt to coerce, compel and constrain" the licensee to hire unneeded employees. (Italics are the Court's.)

All that was held in the *Petrillo* case was that if the allegations of the information that the prohibited result was attempted to be accomplished by picketing are so broad as to include peaceful constitutionally protected picketing, the trial Court would be free to strike them, or the Government could have amended the information, so that "this case had not reached a stage where the decision of a precise constitutional issue was a necessity".

In invalidating the California "Hot Cargo and Secondary Boycott Act" drawn in language comparable to Section 8(b)(4)(A), the Supreme Court of this State cited *Lanzetta v. New Jersey,* 306 U. S. 451, 59 S. Ct. 618, 81 L. Ed. 888, and numerous other United States Supreme Court decisions for the proposition that:

> "Language prohibiting conduct that may be prohibited and conduct that may not affords no reasonably ascertainable standard of guilt and is therefore too uncertain and vague to be enforced." (*In re Blaney, supra,* 30 Cal. (2d) at p. 652; see also *In re Bell,* 19 Cal. (2d) 488, 495, 122 P. (2d) 22.)

A statute which declares unlawful the doing of an act in terms so vague that men of common intelligence

must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Lanzetta v. New Jersey, supra;
Connally v. General Construction Company, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322;
Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066.

The order for injunctive relief appealed from herein (R. 139-140) is couched in the statutory language almost verbatim, the sole change consisting of the addition of the words "by *picketing,* orders, force, threats *or* promise of benefit, *or* by any other like or related acts or conduct" to describe the proscribed methods of inducing or encouraging refusal to perform specified services by the employees of any employer.

Appellants submit that the language of Section 8(b)(4)(A) as incorporated in and amplified by the injunctive order in question (employing the disjunctive expression "picketing *or* orders, force, threats, etc." as distinguished from the conjunctive) is so vague and uncertain as to amount to a denial of due process. (See Appellants' Objections to Petitioner's Proposed Injunction Order, R. 126-127; Reporter's Transcript of Proceedings, dated February 13, 1948, R. 218-219, 228-230, 236-237.)

The following quotation from the opinion in the *Blaney* case is particularly applicable to the dilemma confronting appellants in the present case:

"While the instant statute does not directly impose criminal penalties, it does provide for injunc-

tive relief in the event of its violation and the penalty for disobeying an injunction is contempt of court. It is a coercive measure and *a person does not know in advance whether its application to his conduct will be constitutional or unconstitutional.* He should not be required at his peril to make that determination." (30 Cal. (2d) at pp. 653-654.)

B. The separability clause of Section 16 of the act in question cannot save Section 8(b)(4)(A) from being declared totally invalid.

Section 16 of the amended National Labor Relations Act provides:

> "If any provision of this Act, or the application of such provision to any person or circumstances shall be held invalid, the remainder of the Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

However, if there is no possibility of mechanical severance, as in the case of Section 8(b)(4)(A) where the language is so broad as to cover subjects within and without the legislative power, the general language of the statutory provision infringing upon the constitutional right of free speech leaves the Court with no alternative but to nullify the entire section.

Smith v. Cahoon, 283 U. S. 533, 563, 51 S. Ct. 582, 75 L. Ed. 1264;

In re Blaney, supra, 30 Cal. (2d) at pp. 653-656;

In re Porterfield, supra, 28 Cal. (2d) at p. 120;

In re Bell, supra, 19 Cal. (2d) at p. 498.

"The statute in question contains the provision that 'If any provisions of this chapter, or the application of such provision to any persons or circumstance shall be held invalid, the remainder of this chapter, or the application of such provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby'. (Lab. Code § 1136.) *That separability clause cannot save it* * * *

"By this type of provision, the Legislature has in effect sought to delegate to the courts the task of rewriting the statute, directing them to set forth, in a succession of judicial opinions upholding or annulling judgments enforcing the provisions of the act, thus determining in advance the extent to which the Legislature may go in providing regulations in this field.

"It is an inescapable result that, in the meantime, those individuals who guess correctly will be released by the courts, and those who guess incorrectly will be punished; but that *no one, employer, employee, union or any one will know what the law is until, after violation of the statute and judgment thereon, a higher court is given an opportunity to pass on the question of its validity as applied to the particular 'person or circumstance'.*

"Such a theory of judicial construction cannot be supported on either practical or legal grounds." (*In re Blaney, supra,* 30 Cal. (2d) at pp. 653-656.)

IX.

THE APPLICATION OF SECTION 10(l) AND THE ORDER OF THE DISTRICT COURT HEREIN VIOLATE THE INHIBITION OF THE THIRTEENTH AMENDMENT AGAINST INVOLUNTARY SERVITUDE.

The District Court herein held that there was "no support whatever, under the record before us or within the provisions of the Act that are involved in this matter, for a finding or conclusion that the Thirteenth Amendment has been transgressed". It concluded that "*the inherent and statutory rights of employees,* as such are preserved by the saving provisions in the Act * * *" (R. 108-109.)

The "saving provisions" quoted in this connection consist of Section 502 of the Labor Management Relations Act, 1947, which reads as follows:

> "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent or shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; *nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent;* nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

Although the ineffectiveness of this same "saving provision", so-called, to avoid the imposition of involuntary servitude if the relief sought by appellee

herein should be granted was specifically pointed out to the District Court upon the argument of this matter (R. 177-178), an injunction was issued which by its terms:

> "Ordered that Printing Specialties and Paper Converters Union, Local 388, AFL and Walter J. Turner and each of them and their agents, servants, employees and attorneys and *all persons in active concert or participation with them* be and hereby are *restrained and enjoined* pending final adjudication by the Board of this matter *from: Engaging in,* or inducing or encouraging the employees of any employer, by picketing, orders, force, threats, or promises of benefit or by any other related acts or conduct to engage in, *a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services,* where an object thereof is forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Sealright Pacific Ltd." (R. 139-140.)

As emphasized above, the order runs against Local 388 and its secretary-treasurer, appellant Turner, "and their *agents* * * * and *all persons in active concert or participation with them*".

"Agent" is defined by Section 2(13) of the amended Act so that "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling" in the determination

of whether "any person is acting as an 'agent' of any other person". Section 2(1) defines "person" as including *inter alia* "labor organizations" and "associations". The term "participation" as used in the order is particularly significant in view of the definition of "labor organization" in Section 2(5) as a group "in which *employees participate*". It is perfectly obvious that the order runs to individual employees and not just to the legal fiction of a separate entity known as an unincorporated association.

The order restrains these individual employees from themselves "engaging in a strike or a concerted refusal" to work "in the course of their employment" for the proscribed purposes. *It enjoins concerted activities of union members as such,* including striking and picketing.

This injunctive order was designed to curtail the right of workingmen to combine for their mutual protection by restraining various concerted activities, including peaceful picketing and the boycott, thereby requiring involuntary servitude contrary to the Thirteenth Amendment.

Pollock v. Williams, 322 U. S. 4, 17, 18, 64 S. Ct. 792, 88 L. Ed. 1095;

Bailey v. Alabama, 219 U. S. 219;

American Federation of Labor v. McAdory, 246 Ala. 1, 18 So. (2d) 810;

Henderson v. Coleman, 150 Fla. 185, 7 So. (2d) 117;

In re Blaney, supra;

Stapleton v. Mitchell, 60 Fed. Supp. 51.

The order appealed from herein is directed against concerted activities of union members in the same fashion as the unconstitutional California "Hot Cargo and Secondary Boycott Act" which prohibited "any combination or agreement resulting in a refusal by employees to handle goods or to perform any services for their employer because of a dispute between some other employer and his employees or a labor organization" as well as "any combination or agreement to cease performing * * * any services for any employer * * * for the purpose of inducing or compelling such employer to refrain from doing business with, or handling the products of any other employer because of a dispute between the latter and his employees or a labor organization * * *" (Labor Code §1134, cited *supra.*) It was this restriction on the inherent rights of employees which was struck down as invalid by the *Blaney* decision in reaffirmation of earlier declarations of the California Courts that:

> "It is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly * * * This right is guaranteed by the federal Constitution * * * and it is not dependent upon the existence of a labor controversy between the employer and his employee." (*In re Lyons,* 27 Cal. App. (2d) 293, 81 P. (2d) 190.)

> "Various means of economic suasion such as picketing, the primary and secondary boycotts, and refusal to work together, often go to make up

> concerted efforts * * * Such conduct may be performed in the exercise of civil liberties, guaranteed by both our federal and state Constitutions." (*In re Porterfield,* 28 Cal. (2d) 91, 114, 168 P. (2d) 706, 167 A.L.R. 675.)

Both state and federal courts have repeatedly recognized that attempts by government to prohibit a concerted refusal by union members to handle or work on non-union goods contravene the Thirteenth Amendment. In *Stapleton v. Mitchell,* 60 F. Supp. 51, a statutory three-judge Court composed of Circuit Judges Huxman and Murrah and District Judge Rice held unconstitutional Section 8(12) of the 1943 Kansas Labor Law (Session Laws of 1943, c. 191) which made it unlawful to "refuse to handle, install, use or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization". Judge Murrah, speaking for the Court, said:

> "The right to peaceably strike or to *participate* in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community."

The opinion in *Stapleton v. Mitchell* points out that the statute in question contained both a "saving clause" stating that "except as specifically provided in this Act, nothing therein shall be construed so as to interfere with, impede or diminish in any way the

right to strike or the right of individuals to work; or shall anything in this Act be construed to invade the right of freedom of speech" and "a *severability clause* to the effect that if any provision of the Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect other provisions or applications of the Act * * *"

Neither the "saving clause", comparable to Section 502 of the Labor Management Relations Act, 1947, nor the "severability clause", comparable to Section 16 of the amended National Labor Relations Act and Section 503 of the full Taft-Hartley Act, could save Section 8(12) of the 1943 Kansas Labor Law from being invalidated as an unconstitutional imposition of involuntary servitude.

Employees have a constitutional right to leave employment singly or in concert, and consequently appellants cannot be guilty of unlawful conduct for causing them to do so. (See *United States v. Petrillo,* supra, where the Supreme Court indicated that it would pass upon the question of whether the application of the statute there in question violated the Thirteenth Amendment when it is "appropriately presented.")

X.

THE ATTEMPTS OF CONGRESS TO CONFER UPON THE DISTRICT COURT AND OF THE DISTRICT COURT TO PERFORM HEREIN AN ANCILLARY FUNCTION TO THE BOARD'S ADMINISTRATIVE DUTIES UNDER SECTION 10 OF THE AMENDED ACT VIOLATE ARTICLE III OF THE FEDERAL CONSTITUTION.

The District Court concluded herein that "* * * the specific injunctive processes expressly conferred upon this Court by Section 10(l) of the Act become operable upon the credible petition of the administrative agency as provided in the Act * * *" and therefore, "* * * this court should grant *an appropriate injunction Auxiliary to the proceedings in the Board* * * *" (R. 106-107.)

Thus, the Court below adopted the view contended for by the General Counsel of the National Labor Relations Board that its function in a proceeding under Section 10(l) is limited by Congress to the issuance of injunctions upon the application of Board agents as an ancillary remedy to assist the Board in exercising its exclusive power to adjudicate unfair labor practice charges. The District Court also accepted the General Counsel's argument that a Board agent has an absolute right to injunctive relief in proceedings such as the instant case conditioned only upon a determination that "reasonable cause" exists for his stated belief that an unfair labor practice has been committed; however, the Court is not entitled to require *prima facie* evidence of facts forming the basis for the Board agent's belief in making that determination.

The District Court has adopted the General Counsel's position that "the propriety of such injunctive relief turns not upon traditional equity criteria applicable in suits between private parties, but upon the necessity for effectuating the statutory policy" (R. 43) and that the showing necessary for an injunction against engaging in a strike or concerted refusal to work or "inducing or encouraging" others to do so need not be any greater than that required for an administrative agency to invoke the assistance of the Courts to enforce a subpoena issued in the course of an official investigation. (See *Endicott Johnson Corp. v. Perkins,* 317 U. S. 501 and other cases cited at R. 106.)

The District Court herein says that "in conformity to the rule enunciated by the Supreme Court in Hecht Co. v. Bowles, Admr., 321 U. S. 327, we have given appropriate consideration to all of the evidential material before the court". The fact is that the appellee did not present any evidential material to the Court, either by means of affidavits or direct testimony.

Actually, the District Court has rejected the authority of *Hecht Company v. Bowles,* 321 U. S. 327, 64 S. Ct. 587, 88 L. Ed. 754, which reversed a decision of the United States Circuit Court of Appeals for the District of Columbia holding that the administrator was entitled to injunctive relief as a matter of course under the Emergency Price Control Act. There Mr. Justice Douglas confirmed again the view that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion

which guides the determinations of courts of equity" saying "We do not believe such *a major departure* from that long tradition as is here proposed should be lightly implied."

We respectfully submit that the District Court erred in rejecting appellants' argument below that "the threat to free speech and assembly under Section 8(b)(4)(A) is heightened under [this] view of the limited discretion afforded this Court in performing an *ancillary function* to the Board's adjudicative powers under Section 10." (R. 57-60, commenting in detail on cases which were to be cited later in the memorandum opinion of the District Court.)

While Congress has great powers over inferior courts, it can only require them to exercise the power vested by Article III and cannot clothe them with non-judicial powers. (*Federal Radio Commission v. General Electric Co.,* 281 U. S. 464, 469, 74 L. Ed. 969.) Constitutional Courts cannot "exercise or participate in the exercise of functions which are essentially * * * administrative."

Section 10(l) on its face violates the fundamental principle of *separation of powers* laid down by Article III of the Constitution with respect to the judiciary. This principle has been clearly summarized by the Attorney General's Committee on Administrative Procedure, when it said:

> "Federal courts created under Article III can be authorized only to decide 'cases and controversies' to use the constitutional phrase; and from an early day the Supreme Court has regarded

this restriction as an important one, to be scrupulously observed. 'Cases and controversies', broadly speaking, are matters in which a court can determine the rights of adverse parties by applying the law to the facts as found."

(Sen. Doc. 8, 77th Cong., 1st Sess., p. 12.)

XI.

THE FINDINGS OF FACT SPECIFIED AS ERROR HEREIN ARE CONTRARY TO AND UNSUPPORTED BY THE EVIDENCE, AND OMIT MATERIAL UNCONTROVERTED FACTS ESTABLISHED BY THE RECORD.

The failure of the District Court to require the appellee to make even a *prima facie* showing of the purported facts which he claims to have reasonable cause to believe to be true and the obvious refusal to give any weight to the uncontroverted affidavit of Appellant Turner are apparent from a reading of the record.

The petition for injunction (R. 2-8) is not in reality a verified petition, since the only verification present is that of the regional director that he had reason to believe that certain acts took place and circumstances existed. No direct allegation or proof was offered in any manner whatsoever that the facts and incidents in question did occur. No witnesses and no affidavits were presented by appellee, and therefore it was error to make any findings of fact where such facts were not admitted or conceded by appellants.

The District Court accepted the proposed findings presented by the general counsel of the Board almost

without change, despite the detailed objections of appellants. (R. 120-127.)

Perhaps the most serious error has to do with the findings that the picketing activities herein complained of are characterized as inducing and encouraging conduct on the part of employees of the Los Angeles-Seattle Motor Express and West Coast Terminals Companies *"by orders, force, threats or promises of benefits"*. (R. 136-137.)

As in the *Wohl* case, 315 U. S. at p. 776, the record here

> "* * * does not contain the slightest suggestion of embarassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing."

The absence of factual material to support the conclusion of law that the employees in question were induced or encouraged "by orders, force, threats, or promises of benefits" and the obvious inference that this language was simply inserted in the petition for the purpose of attempting to avoid the application of Section 8(c) were called to the attention of the District Court during argument. (R. 161 and 176.)

Moreover, during the course of that same argument, the attorney for the general counsel of the Board plainly stated:

"We do *not* assert that there has been any violence on the picket line, or that any threats have been made, any express threats have been made. *The picketing I think can be termed peaceful picketing* in the sense that there has been no violence on the picket line, no disturbance of any kind. Nevertheless we feel that this sort of picketing is a violation of Section 8(b)(4)(A) of the Act * * *." (R. 204.)

CONCLUSION.

In his speech before the Conference of Circuit and District Judges at New Orleans on June 4th, General Counsel Robert N. Denham personally sought to justify his interpretation of Section 8(b)(4)(A) by expounding the notion that:

"* * * in view of the *Duplex Deering* and *Bedford Stone Cutters* cases decided about 25 years ago, there should be no doubt that peaceful picketing in pursuit of a secondary * * * boycott does not enjoy constitutional protection."

(National Labor Relations Board Press Release R-87, p. 22.)

These decisions of a quarter century ago were rendered before the "modern trend of decision" identifying picketing with free speech and assembly. See the dissenting opinion of Mr. Justice Brandeis in the *Duplex* case, 254 U. S. 443, at 481, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196, wherein he queried, "May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of

living and the institution which they are convinced supports it?", and answered his own inquiry by saying, "* * * in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself." (Cf. R. 111, citing the *Duplex* case.)

This dissent and a similar opinion six years later in the *Bedford Stone Cutters* case, 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 A.L.R. 791, where he condemned legislative restrictions on the boycott as "an instrument for imposing restraints upon labor which reminds one of involuntary servitude", ultimately led to the identification of picketing with free speech in Mr. Justice Brandeis' majority opinion in *Senn's* case, *supra,* 301 U. S. 468.

These modern constitutional doctrines, such as that expressed by Chief Justice Stone in *United States v. Hutcheson,* 312 U. S. 219 at p. 243, 61 S. Ct. 463, 85 L. Ed. 788 (namely, "the publication unaccompanied by violence of a notice that the employer is unfair to organized labor * * * is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by Act of Congress") should not have been overlooked by the general counsel, nor by the District Court herein.

Dated, July 9, 1948.

Respectfully submitted,

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